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SUPREME COURT, U. S.
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Supreme Court of the United States

No. 178. October Term, 1942.

ILLINOIS COMMERCE COMMISSION, JOHN D. BIGGS, WILLIAM PARRILLO, *et al.*,

Appellants,

against

CHARLES M. THOMSON, as Trustee of the Property of Chicago and North Western Railway Co.,

Appellee.

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF REVERSAL.

Dated, New York, January 5, 1943.

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Supreme Court of the United States

No. 178. October Term, 1942.

Illinois Commerce Commission, John D. Biggs, William Parrillo, *et al.*,
Appellants,

against

Charles M. Thomson, as Trustee of the Property of Chicago and North Western Railway Co.,
Appellee.

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF REVERSAL.

This is an appeal from an order of the District Court, Northern District of Illinois, by which the appellants are enjoined from enforcing certain Illinois statutes, in disregard of which the appellee (hereinafter styled "the North Western") instituted increases in intrastate commutation fares. The Court below held that the general passenger-fare order of the Interstate Commerce Commission, made on January 21, 1942 in a nation-wide general revenue investigation, had the incidental effect of barring State authority, and of reviving in the Interstate Commerce Commission intrastate jurisdiction which it had exercised on October 6, 1925 for the purpose of correcting discrimination against interstate commerce then existing.

Preliminary Statement.

This record presents for consideration four orders of the Interstate Commerce Commission. Three of them are successive general revenue orders resulting from investigations pursuant to §15a of the Interstate Commerce Act[1] into the economic well-being of the nation's railroads. One of them was a discrimination order issued under §13(3) and (4) of the Interstate Commerce Act to implement a prior §15a order and to correct prejudice to interstate commerce resulting from the relation between the intrastate commutation rates of the North Western and the interstate fares prescribed by that prior §15a order.

The first §15a general revenue order was made on July 29, 1920 in *Ex parte* 74, *Increased Rates*, 58 I. C. C. 220. It "*required*" all interstate fares to be increased 20% and established a 3.6¢ minimum fare per mile for standard one-way interstate passenger transportation.

Thereafter, the Interstate Commerce Commission undertook discrimination investigations, in various States, pursuant to its authority under §13 of the Act, to correct prejudice to interstate commerce resulting from disparity between intrastate and interstate fares. A §13 order was issued in Illinois on October 6, 1925 in Docket No. 11703 (102 I. C. C. 479). It affected only the North Western, and "*required*" it to apply to its intrastate commutation rates

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[1] "15a. Fair return for carriers.

(1) When used in this section the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

the 20% increase which had been added to interstate fares on July 29, 1920 in *Ex parte* 74. The North Western obeyed, and the prejudice to interstate commerce was thus cured.

The second nation-wide §15a general revenue investigation resulted in an order of February 28, 1936 in Docket No. 26550 (*Passenger Fares and Surcharges*, 214 I. C. C. 174) and "*required*" the carriers to reduce their standard interstate one-way fares to 2¢ per mile as a maximum. This requirement was expressly confined to interstate fares. A direct result of this order, as declared by the Interstate Commerce Commission itself, was to terminate the §13 orders which had been issued to implement the §15a order of 1920, and thus to restore State authority. Among the orders so discharged was the 1925 §13 order in Docket No. 11703, by which the North Western's intrastate commutation fares had been correlated with the fare structure of *Ex parte* 74 (*infra*, pp. 25-30). The North Western maintained those commutation fares unchanged, although it reduced its standard interstate fares in compliance with the 1936 order (R. 9-10).

The third §15a general revenue investigation has precipitated this litigation. It resulted in the order of January 21, 1942 (*Ex parte* 148, *Increased Railway Rates, Fares and Charges*, 248 I. C. C. 545). Unlike its predecessors, the 1942 order did not "*require*" the carriers to do anything. It merely "*permitted*" a 10% fare increase in interstate commerce, as sought by the carriers. It expressly contemplated the normal exercise of State authority to permit corresponding increase of intrastate rates. In language vital to this case it recites that (R. 32)

> "similar application has been or will be made to the regulatory authority of the respective States for permission to increase similarly petitioners' intrastate rates, fares and charges; * * *"

And yet, this is the order by which, according to the Court below, (R. 55):

> "the Interstate Commerce Commission asserted and exercised its paramount and exclusive authority in the regulation of the passenger fares here involved, leaving the Illinois Commerce Commission without power to act with respect thereto."

The increased intrastate fares (which the Illinois Commerce Commission sought to suspend merely for investigation) were found by the Court below to be "the lawful existing fares" which the North Western was "required to collect" by force of the January 21, 1942 order, and without recourse to the Illinois Commerce Commission (R. 53).

The Issue and Its Importance.

(1)

This case presents a novel version of the established proposition that federal jurisdiction does not exist to regulate intrastate commerce except when necessary to the protection of interstate commerce from discrimination, prejudice or preference. Such federal intrastate jurisdiction heretofore has been recognized only as ancillary to some distinctly formulated pre-existing regulatory policy in the interstate field; and it has been available only after distinct and particular findings of discrimination or prejudice have been established. This Court has declared Interstate Commerce Act §13(3) and (4) to be ancillary to §15a, which is the basis of general revenue investigations. *Railroad Commission of Wisconsin* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 586 (1922).

The Court below, however, attributed to the general revenue order of January 21, 1942, resulting from an investigation of the rates and fares throughout the country in their broadest aspect, the force of a §13 discrimination

order against State rates, construing it, by implication, as a direct requirement that the North Western alter its intrastate commutation fares.

Simply stated, the question here is whether that order, fairly construed, required the North Western to increase its intrastate rates in derogation of State authority; and if it did, whether it could be deemed valid in view of its origin in a §15a general revenue investigation, rather than a §13 discrimination proceeding.

(2)

The present case is one of general interest and importance as well as novelty. It is the first instance in which a general revenue order of the Interstate Commerce Commission has been accorded the force of a peremptory requirement that intrastate rates be changed. The relevant history of intrastate fare regulation in Illinois is paralleled in many other States, in one of which the questions here involved have been judicially considered already. They may well recur elsewhere.

The courts of New York, addressing themselves solely to the meaning of the order, found that it did not require change of intrastate fares in derogation of State authority. *Matter of Transit Commission* v. *Long Island Rail Road Co.*, 178 Misc. 290, 33 N. Y. Supp. (2d) 993, aff'd 265 App. Div. 847 (1st Dept., 1942; appeal to Court of Appeals pending).[2] In New York, the history of relevant Interstate Commerce Commission orders has been essentially the same as in Illinois; the single §13 discrimination order directing change of New York intrastate fares to harmonize them with the interstate fares resulting from *Ex parte* 74 was an order of November 13, 1920 in Docket No. 11623 (59 I. C. C. 290).

[2] The New York courts ruled that the validity of the order was a Federal, not a State question.

At the suggestion of the New York court, the New York railroads applied to the Interstate Commerce Commission for an express declaration that the order of January 21, 1942 required change of intrastate rates.[3] This application was denied.[4]

(3)

It is the purpose of the City of New York, in submitting this brief, to second the appellants' prayer for reversal upon the present record, the facts of which are the allegations of the complaint as admitted by demurrer. But if the Court do not reverse, it is our purpose to urge that the most that could be said upon the present record, for the North Western, concerning the meaning of the order, is that it is unclear; and that in such case the cause should be remitted with directions to permit full trial of the question whether the order can properly be construed to require change of intrastate rates without State sanction. Accordingly, we shall refer to the *Transit Commission* case as a demonstration that this question would probably be decided against the holding of the Court below, upon full proof of the utterances, actual practices and procedures of the Interstate Commerce Commission.

In support of this recommendation, which is peculiarly ours, we shall refer to matters of Interstate Commerce Commission history considered by the New York courts, which are of public record, but which, whether or not they are subject to judicial notice here, are not apparent upon the face of the present record.

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[3] *Cf. Arkansas Railroad Commission* v. *Chicago, R. I. & P. R. R. Co.*, 274 U. S. 597, 603 (1927).

[4] The order of the Interstate Commerce Commission denying this application is annexed hereto as "Appendix A", *infra*, p. 43. The *Transit Commission* case was reopened by the Court thereafter, and a supplemental opinion referring, *inter alia*, to this order, resulted. We annex the supplemental opinion as "Appendix B", *infra*, pp. 44-46.

Relation Between §15a General Revenue Orders and §13 Discrimination Orders of the Interstate Commerce Commission.

When the Interstate Commerce Commission launches upon a general revenue investigation, it complies with the mandate of Interstate Commerce Act §15a, requiring it to procure for the public adequate railroad service at reasonable rates with

> "due consideration • • • to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

The result of such an investigation, conducted upon a regional or national scale, is typically the determination that certain changes broadly applicable throughout the railroad industry may be or should be instituted, upon the ground that they conduce to the economic health of the industry as well as to the public convenience in the maintenance of the national transportation system. The orders of 1920, 1936 and 1942, to which we have referred, *supra*, pp. 2 to 4, are orders in general revenue investigations, each of which examined only into such matters as were of common interest to the carriers as the components of a national transportation system; and they made changes applicable in a correspondingly broad and general way.

Since the Interstate Commerce Commission has no general power to regulate intrastate commerce (Interstate Commerce Act, §1 [2a]), the Commission is given an exceptional intrastate jurisdiction only where it is necessary to protect interstate commerce from undue detriment which would otherwise result. Thus, §13(3) of the Act announces:

> "Whenever • • • there shall be brought in issue any rate, fare • • • or practice, made or imposed by authority of any State"

which (§13[4])

> "* * * causes any undue or unreasonable advantage, preference or prejudice as between * * * intrastate commerce on the one hand and interstate or foreign commerce on the other hand,"

the Interstate Commerce Commission

> "* * * shall prescribe the rate, fare * * * or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice or discrimination * * * the law of any State or the decision or order of any State authority to the contrary notwithstanding."

The 1925 order, by which the Interstate Commerce Commission brought the fares at bar into harmony with the general fare structure created in interstate commerce by *Ex parte* 74 in 1920, is a representative §13 discrimination order.

Section 15a orders may be mandatory or permissive as to interstate commerce, but, if they refer at all to intrastate rates, do so only suggestively or permissively. Every §13 order is directed solely to intrastate commerce, and is mandatory, not permissive. Thus, by the terms of the 1925 §13 order the North Western was "required to cease and desist" from engaging in specified discriminatory intrastate practices (R. 31).

The intrastate jurisdiction of the Interstate Commerce Commission under §13(3) and (4) is ancillary to its general jurisdiction over interstate commerce under §15a. In the words of this Court in *Railroad Commission of Wisconsin* v. *C., B. & Q. Railroad Co.*, 257 U. S. 563, 586 (1922),

> "Section 15a confers no power on the Commission to deal with intrastate rates. What is done under that section is to be done by the Commission 'in

> the exercise of its power to prescribe just and reasonable rates', *i. e.*, powers derived from previous amendments to the Interstate Commerce Act, which have never been construed or used to embrace the prescribing of intrastate rates. When we turn to paragraph 4, §13, however, and find the Commission for the first time vested with a direct power to remove 'any undue, unreasonable, or unjust discrimination against interstate or foreign commerce', it is impossible to escape the dovetail relation between that provision and the purpose of §15a."

This "dovetail relation" between §15a and §13 orders was apparently reversed by the Court below when it construed the general revenue order of 1942 as, in effect, a §13 discrimination order barring State jurisdiction. But until and unless a relevant rate structure has been brought into existence under the sanction of §15a, there exists no occasion for recourse by the Interstate Commerce Commission to §13. The whole reason for the existence of §13 is protection to some *pre-existing* scheme of regulatory policy, the standards of which are declared by §15a. Section 13 presupposes §15a; and a §13 order necessarily presupposes the existence of a system of interstate rates established under §15a.

Whereas the §13 discrimination order of 1925 was ancillary to the §15a order of 1920, the Court below undertook to make the general revenue order of 1942 ancillary to the §13 order of 1925.

No instance has been found in which the Interstate Commerce Commission made a discrimination order for the protection of interstate rates not actually in effect; and a §13 order outstanding for the protection of interstate commerce under a given rate structure becomes meaningless when a drastic revision of the interstate rate level takes place (*infra*, pp. 25-31, 34-37). In such a case the comparative basis of the §13 order ceases to exist, and the

question of prejudice to interstate commerce under the new general rate structure must be considered *de novo*.

Regulation of the North Western's Intrastate Commutation Fares in Illinois by the Interstate Commerce Commission.

The only §13 proceeding referred to in the record is that which resulted in the order of October 6, 1925. It followed the rules prescribed for this type of proceeding and exhibits all of the special characteristics associated therewith—a petition or complaint specifying with a high degree of particularity the discrimination complained of,[5] a mandatory notice to the State involved, accompanied by a copy of the complaint, a full hearing resulting in specific findings of discrimination as against pre-existing interstate fares, and a "cease and desist order" which must be obeyed "on or before" a fixed date.

While the petition in the 1925 §13 proceeding is merely referred to in the record (R. 31) without being set forth at length, both it and the notice to the State of Illinois[6] comply with §13 standards.

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[5] Interstate Commerce Commission Rules of Practice III(n) provide:

"[Complaints as to intrastate rates.] If the complaint brings in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State * * * as causing any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared unlawful by section 13 of the act * * * facts should be stated with sufficient definiteness to disclose fully the contention made in respect of any tariff provision made or imposed by authority of any State * * *."

[6] Annexed hereto as "Appendix C" and "Appendix D" respectively, *infra*, pp. 47-52, 53-54. The North Western's representation before the Interstate Commerce Commission in 1925 included its principal counsel herein in the Court below (p. 52).

The 1925 §13 order is expressly predicated upon a "full investigation of the matters and things involved" (R. 31). Its supporting report explicitly refers to the (R. 30)

> "just and reasonable interstate fares and charges established and maintained by petitioner pursuant to the authority heretofore given by this commission in *Ex parte* 74 * * *."

This reference in the §13 discrimination order to the prior §15a general revenue proceeding which provides the basis of the comparison from which the conclusion of detriment to interstate commerce is drawn, is characteristic; and it illustrates the ancillary function of the §13 discrimination order to compel the cure of intrastate conditions harmful to interstate commerce as it has been organized for revenue production under §15a.

Ex parte 74 (58 I. C. C. 220) was a general revenue investigation in 1920 which increased interstate fares 20% and resulted in the fixation by the Interstate Commerce Commission of passenger fares upon the basis of a 3.6¢ minimum charge per mile for standard one-way transportation. It was the revenue anticipations of the North Western as predicated upon this 3.6¢ standard fare basis which the 1925 §13 discrimination order was intended to protect. In the service of that intention the 1925 order put the intrastate fares here involved in such a relationship to interstate fares as gave assurance to the Commission that this class of business would produce its due proportion of the North Western's entire revenue. The North Western had not increased its fares for this class of travel in 1920, when the order in *Ex parte* 74 took effect. Accordingly, the 1925 order "required" the North Western to increase these intrastate fares by 20%; but since they were commutation fares not referable to any single rate per mile, and materially lower

in general than fares for one-way transportation, the 1925 report and order expressly limited them to a maximum or ceiling of 2¢ per mile (R. 27, 31), below which they were to be in ratio to the North Western's customary descending scale. Thus the Commission determined that, if the intrastate commutation fares of the North Western were adjusted to scale down from a maximum of 2¢ a mile, they would be non-discriminatory as against an interstate fare structure built upon a 3.6¢ minimum for standard one-way travel (R. 22, 28).

The distinguishing characteristics of a §13 proceeding are evidenced in the following language of the 1925 order (R. 31):

> "*It is ordered*, That the Chicago & North Western Railway Company, * * * is hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said supplemental report to exist, and to establish, put in force, and maintain multiple-trip and commutation fares for the transportation of passengers in intrastate commerce on said carrier's lines within the State of Illinois which shall be respectively higher by 20 per cent than those in effect on said lines and applicable to said transportation on August 25, 1920, subject to a maximum of 2 cents per mile."

And the order provided that it "shall become effective on or before November 23, 1925" (R. 31)—leaving virtually nothing to the carrier's discretion.

The only examination into the relationship between the North Western's intrastate commutation and its interstate fares ever made by the Interstate Commerce Commission was the §13 investigation resulting in the order of 1925.

The general revenue investigation of 1936 revolutionized standard interstate fares by abolishing the 3.6¢ *mini-*

mum and imposing a 2¢ *maximum* fare per mile. The North Western's intrastate commutation fares remained unchanged, however. In relation to basic interstate fares, they were thus greatly increased. *The increase approximated 80%.* This terminated the "dovetail relation" created in 1925, ended the existence of the 1925 discrimination order, and restored jurisdiction over these intrastate fares to the State of Illinois.

The investigation in *Ex parte* 148, the complaint concedes, was "a further nationwide general investigation" (R. 8). It did not consider, and could not have concerned itself with the North Western's intrastate commutation fares; the Interstate Commerce Commission neither intended nor had authority thus to revive the expired §13 order of 1925. An examination of each step throughout the entire *Ex parte* 148 proceeding will demonstrate that none of them met any of the conditions precedent to intrastate jurisdiction in the Interstate Commerce Commission.

Apart from these considerations, the regulation of commutation fares in the Chicago suburban zone presents peculiarly local problems which local authorities, because of greater familiarity, should be encouraged to pass upon in the first instance. This is obvious, and would amply warrant primary regulation by local authority, in any event. The action taken by the Illinois Commerce Commission in relation to the North Western's increased fares is not final; it has been mere suspension for purposes of investigation. Recourse to the Interstate Commerce Commission under §13 will still be available if the Illinois authority, after investigation, should reach a result prejudicial to interstate commerce.

Argument.

Our discussion will be developed under the following points:

I. The Court below erred in construing the general revenue order of January 21, 1942, rendered in a §15a proceeding, *Ex parte* 148, as requiring change of intrastate fares in derogation of State authority.

II. In *Ex parte* 148, a general revenue proceeding under §15a, the Interstate Commerce Commission had no power to order change of intrastate fares.

III. If the order appealed from be not reversed, the cause should be remanded with directions to permit the meaning of the order of January 21, 1942 to be determined upon evidence.

POINT I.

The Court below erred in construing the general revenue order of January 21, 1942, rendered in a §15a proceeding, *Ex parte* 148, as requiring change of intrastate fares in derogation of State authority.

The order of January 21, 1942, in its origin and upon the face of its recitals, could not warrantably be construed as an assertion of jurisdiction over the intrastate fares of the North Western; and such construction could not reasonably be developed out of any reference, express or implied, made in it to any prior order or action of the Interstate Commerce Commission. The Interstate Commerce Commission has already rejected such construction.

(1)

The order of January 21, 1942 did not result from a §13 proceeding, but from one which expressly contemplated normal State action on intrastate fares.

(a) The Initiating Petition in *Ex parte* 148.

The initiating petition in *Ex parte* 148 invoked only the interstate jurisdiction of the Interstate Commerce Commission. Witness the language of the Commission (Docket No. 28846, *Increases in Texas Rates, Fares and Charges*, ... I. C. C. ....., decided December 18, 1942):

> "The petition filed by the carriers with us on December 13, 1941, seeking increases in their rates, fares, and charges on *interstate traffic*, docketed as Ex Parte No. 148, was *so limited because of our jurisdiction* • • •." (Italics ours.)

The report in *Ex parte* 148 (248 I. C. C. 545, 549) characterized the railroads' plea thus offered as a prayer for

> "orders necessary to enable them to increase their rates, fares, and charges in *interstate or foreign commerce* • • •." (Italics ours.)

This initiating petition sought jurisdiction under but one section of the Interstate Commerce Act, namely, §15a, thus (Par. IV):[7]

> "Petitioners state that • • • the rates, fares, and charges under which they are now operating will not be adequate • • • to insure their ability to continue in the public interest the adequate and efficient service contemplated by §15a of the Act."

The railroads urged broadly that a general revenue increase was justified by general increases in the cost of labor, of

[7] For the convenience of the Court, this petition (which is partly paraphrased in the complaint) is annexed hereto as "Appendix E", *infra*, pp. 55-62.

materials and of protection to their property necessitated by the national emergency. All the allegations of the initiating petition were broad, general, and applicable to the railroad industry as a whole, rather than to any railroad, to any region or to any transportation function particularly.

The petitioning carriers did not put in issue the propriety or reasonableness of the relationship between intrastate rates, fares and charges on the one hand and interstate rates, fares and charges on the other hand, either of the carriers at large or of any railroad in particular. The carriers' petition was not intended as an invitation to the Interstate Commerce Commission to assert intrastate jurisdiction under §13(3) and (4). It uttered only the broadest generalities. It entailed none of the jurisdictional predicates of a discrimination inquiry under §13, and it complied with no part of the Commission's Rule III(n) (*supra*, p. 10, n. 5). It alleged no advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand; neither did it allege any undue or unjust discrimination against interstate or foreign commerce arising out of the relationship between interstate and intrastate rates, fares or charges.

Unlike a complaint against State rates, it omitted to request the Interstate Commerce Commission to "prescribe the rate, fare, or charge" so as to "remove such advantage, preference, prejudice, or discrimination" (§13[4]). It did not request action "the law of any State or the decision or order of any State authority to the contrary notwithstanding" (*ibid.*).

(b) The Notice of Hearing in *Ex parte* 148.

Upon the coming in of the carriers' petition for the investigation in *Ex parte* 148, the Interstate Commerce

Commission sent out a notice of hearings to be held.[8] This was the only notice given to any State. It made no reference to intrastate commerce, or to intrastate jurisdiction contemplated. Thus, neither the petition of the carriers as served upon the State authorities, nor the notice of hearing could reasonably have been construed as the institution of an investigation into State rates; §13 consequences could not have been anticipated, nor could they have resulted.

We invite comparison of the petition and notice of hearing in the 1925 §13 proceeding (Appendices C and D, *infra*, pp. 47-54), with the petition and notice of hearing in the general revenue investigation of 1942 (Appendices E and F, *infra*, pp. 55-63).

Section 13 of the Act, which is subdivided into four parts, treats of *all* kinds of complaints to, and investigations by, the Commission. However, in the parlance of commerce regulation, and in this brief, any unqualified reference to §13 (*e.g.*, "Thirteenth Section order") connotes Federal action in derogation of State authority. It was particularly unfortunate, in view of this customary connotation, for the brief of the North Western in the Court below (p. 4) to have described the notice of hearing given to the States in *Ex parte* 148 "as required by Section 13" —*innuendo*, that a discrimination inquiry had been begun.

Section 13 refers to *two* types of notice to States—the *voluntary*, which was actually given, and the *mandatory*, required when a State rate or regulation is under attack, which was not given. The notice actually given to the States in *Ex parte* 148 was given *voluntarily* pursuant to the statutory authority of the Interstate Commerce Commission "to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision" of the Act (§13[3]). But the Act refers

[8] Annexed hereto as "Appendix F", *infra*, p. 63. In evidence in *Matter of Transit Commission* v. *Long Island Rail Road*, *supra*, p. 5.

particularly to the case of a discrimination investigation of State rates, saying that, when there is (*ibid.*)

> "brought in issue any rate, fare, charge, classification, regulation, or practice made, or imposed by authority of any State * * *, the Commission * * * shall cause the State or States interested to be notified * * *."

In other words, the Commission, at its own option, *may* invite State cooperation with *any* of its activities; but when proceeding under paragraph 4 of §13, the paragraph which obliges the Commission to cure discrimination resulting from State regulations, it *must* notify the State, the regulations of which have been challenged, to appear or default.

That the notice given to the States in *Ex parte* 148 was a mere invitation to voluntary cooperation and not the mandatory type of notice is shown by the language of the initiating petition of the carriers (Appendix E, *infra*, p. 61):

> "It is respectfully suggested, therefore, that the cooperation of the State commissions be invited * * *";

and by the report (248 I. C. C. 545, 549):

> "* * * we sought the cooperation of the State commissions."

(c) The Report and Findings in *Ex parte* 148.

The panoramic survey of general railroad revenue undertaken in *Ex parte* 148, and directed to the development of a *future* interstate rate level, could not have been a discrimination investigation looking toward the development of specific and particular findings of detriment to interstate commerce as organized under a revenue scheme not yet in existence, as such detriment might conjecturally

result from the fares of any carrier, or be sanctioned by the authority of a particular State.

The report says (248 I. C. C. 545, 607):

> "A nation-wide increase, chiefly on a percentage basis, is now proposed. * * * Obviously, there can be no detailed ironing out of inequalities in this proceeding."

Again at p. 609:

> "It would be desirable, if feasible, to consider the needs of the railways individually, and to adjust their respective schedules to meet their several needs. The exigencies of the case do not permit such refinement."

The report, upon which the passenger-fare order of January 21, 1942 is based was issued March 21, 1942. It contains not a single comparison between the facts of railroad operation intrastate and the facts of railroad operation interstate.[9] It contains no findings of discrimination, prejudice or undue burden or detriment to interstate commerce resulting from any fact or condition or circumstance of intrastate commerce. In the absence of such findings, the Interstate Commerce Commission could not be presumed to have directed this order to intrastate fares; and the Court below erred in holding to the contrary.

The silence of the report as to discrimination or undue burden or detriment to interstate commerce contrasts sharply with the express recitals of the report supporting the §13 discrimination order of October 6, 1925 (R. 19-31 at 30):

> "We find that * * * the maintenance of such intrastate fares and charges lower than the corresponding just and reasonable interstate fares and

[9] The portion of the report dealing with passenger fares is annexed to appellants' brief as "Appendix B".

> charges established and maintained by petitioner pursuant to * * * *Ex parte* 74 gives an undue preference and advantage to persons traveling in intrastate commerce * * * and unjustly discriminates against interstate commerce; which undue preference and prejudice and unjust discrimination should be removed.
>
> We further find that, to remove the undue preference and prejudice and unjust discrimination found to exist, petitioner should establish and maintain intrastate commutation passenger fares * * * which shall be respectively higher by 20 per cent than those in effect * * * on August 25, 1920, subject to a maximum of 2 cents per mile."

Those findings were clear and distinct, and conformed to the standards of particularity established by this Court. *Florida* v. *U. S.*, 282 U. S. 194 (1931); *cf. U. S.* v. *Louisiana*, 290 U. S. 70, 80 (1933).

Since §13(4) directs that the Interstate Commerce Commission, when it acts to correct discrimination resulting from state rates, fares or charges, "shall prescribe" the remedy, there is special significance in the following language from the conclusions of the Commission in *Ex parte* 148 (248 I. C. C. 545, 613):

> "Rates and charges increased as herein permitted are not prescribed rates and charges within the meaning of *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370."

Rates and fares fixed for intrastate commerce by the Interstate Commerce Commission under §13 *must* be "*prescribed*"; whereas here we have a disclaimer that "prescribed" rates result from *Ex parte* 148. The quoted language is not to be deemed applicable to freight rates alone, for under §15a "the term 'rates' means rates, fares, and charges" (*supra*, p. 2, n. 1). Moreover, the same general

revenue investigation could not result in *prescribed* passenger fares in the intrastate field, but elective or optional freight and passenger rates and fares in the interstate field. It was the manifest purpose of the Interstate Commerce Commission to bring into existence an order so completely permissive in all of its terms and implications as to be wholly beyond the scope of judicial review, within the meaning of *Columbia Broadcasting System, Inc.* v. *U. S.*, 316 U. S. 407 (1942) and *U. S.* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299, 309-310 (1927), and the authorities therein cited.[10]

(d) The Recitals of the Order of January 21, 1942.

Notwithstanding all else in this case, the language of the order itself prohibits construction negativing State authority.

The order recites (R. 32) that

> "similar application has been or will be made to the regulatory authority of the respective States for permission to increase similarly petitioners' intrastate rates, fares, and charges;* * *."

It is thus predicated upon an expectancy that the various State commissions will in due course pass upon such applications. This is as clear an acknowledgment of State jurisdiction in the intrastate field as language can accomplish.[11]

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[10] This purpose was frankly avowed by the presiding Commissioner (Mr. Aitchison), who declared (S. M. A511K):

> "Of course, this case is one where we are not getting ready a record for the Court, you know, for Court review."

[11] Upon the record in *Ex parte* 148 the railroads' representative (Mr. Cleveland) uttered a prepared opening statement (S. M., pp. A 102 to A 120) concluding as follows (S. M., p. A 120):

> "We trust that the various State Commissions in their cooperative action with the Interstate Commerce Commission will give expeditious and favorable consideration to the corresponding petitions filed with them."

The order does not fix a date for change of fares, but merely declares that "the increased fares herein authorized may be made effective upon not less than 10 days' notice to the Commission * * *" (R. 34). The railroads thus control, each for itself, the date of change of fare pursuant to the order. Such change may be made at any time, provided 10 days' notice be given to the Interstate Commerce Commission. Change need not be made involuntarily. And the Commission contemplates future determination of "the lawfulness of any particular fare or fares, resulting from this order" (R. 34).

Notwithstanding the order's total lack of mandatory language the Court below gave it mandatory force by construing a *mention* in it of the §13 order of October 6, 1925 as a *re-enactment*, but "expressly modified" (R. 55). We postpone at this juncture our demonstration that the 1925 order had become *functus officio* (*infra*, pp. 25-31), to show that even if it were deemed in force in 1942, no arguable modification of it by the 1942 order could be more than permissive of change in intrastate fares. The very language of the 1942 order which "modified" prior orders does so "only to the extent necessary to permit the increase herein authorized to be added"—the increase is clearly not required to be added (R. 33). This language of permission contrasts vividly with the peremptory language of a §13 discrimination order, *e.g.*, that of October 6, 1925, which calls upon the North Western to "cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found * * * to exist, and to establish, put in force, and maintain" stated increases of fare "on or before November 23, 1925" (R. 31).

In 1942 the Commission intended only *not to oppose the wishes of the carriers*, as those wishes were expressed in applications to State and Federal regulatory authorities alike; it "permitted" the increases in interstate commerce,

and modified *all* outstanding rate orders—whatever their subject or nature—"but only to the extent necessary *to permit*" the change of general fare basis to be realized. In 1936, on the other hand, the Commission had unmistakably "*required*" change of interstate fares, while it "modified" in the intrastate field "to the extent only that may be necessary to permit" effectuation of the new general fare basis (*infra*, p. 29, n. 15; p. 65). The Commission itself distinguishes "permit" from "require". It knew in 1936 that the general revenue order of that year did not require change in intrastate fares which had been the subject of prior §13 discrimination orders (see p. 27 *infra*, n. 14); in the Court below the North Western conceded this, and the Court so found (R. 7, 51). Since the language of the 1936 order referable to intrastate fares was not a requirement of change, it was not a requirement of change when it was repeated in the 1942 order, *viz.*, "modified • • • only to the extent necessary to permit the increase • • •" (R. 33).

Although the North Western had signed the petition initiating *Ex parte* 148, it submitted no application respecting the fares in suit to the State of Illinois. Representative carriers did, however, apply to State authority as the order contemplated, *e. g.*, in Texas and in Rhode Island, for leave to make corresponding changes intrastate. Upon denial of such applications by the States, the carriers applied to the Interstate Commerce Commission for §13 relief, and upon proof of prejudice and detriment to interstate commerce, elicited orders requiring correction of the intrastate fares (Docket No. 28846, *Increases in Texas Rates, Fares and Charges*, ... I. C. C. ....., decided December 18, 1942; Docket No. 28827, *Rhode Island Commutation Fares*, 253 I. C. C. ....., decided September 8, 1942). The report of the Interstate Commerce Commission in the latter case, referring to the inception of *Ex parte* 148, and to the procedure followed by the carriers to procure permission of the State

authorities in the intrastate field as promptly as they could after securing Interstate Commerce Commission consent to the increased fares in the interstate field, stated:

> "By petitions duly filed with various State regulatory bodies, the carriers sought authority to increase their intrastate freight rates and passenger fares and charges corresponding to the increases authorized on interstate traffic, to become effective at the same time that the increased interstate rates and fares should become effective [*Ex parte* 148]."

Other representative carriers filed the "similar applications" to which the order of January 21, 1942 referred.[12]

No tenable construction of the order of January 21, 1942 can deny meaning to those of its parts which acknowledge State jurisdiction over intrastate fares; nor can any valid construction read out of the order the significance of its language giving each carrier control of the date when its rates and fares might be changed—language of permission.

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[12] In New York, such a "similar application" (by the New York Central, the Long Island and the Staten Island) was filed with the Transit Commission during the pendency of *Ex parte* 148. It acknowledged the force of New York State statutes corresponding to the Illinois statutes herein involved, and prayed for their suspension in the discretion of the Transit Commission thus:

"WHEREFORE, your Petitioners respectfully request that this Commission, in pursuance of the powers vested in it by the aforesaid Public Service Law, permit * * * without suspension * * * the same advances in all New York intrastate rates, fares and charges as shall be authorized or directed by the Interstate Commerce Commission [in *Ex parte* 148] * * * as to interstate rates, fares and charges * * *."

Another such application submitted to the Public Service Commission of New York by representative railroads for leave to increase commutation rates, offered as persuasive considerations the following:

"It is expected that intrastate passenger fares in all of the States in Official Classification Territory will likewise be increased on February 10th. *Most of the eastern States already have granted the necessary authority.* Likewise, under the authority of the respective State Commissions, the commutation fares in the important Philadelphia-Camden and Boston Metropolitan Districts will be increased by 10 per cent, effective February 10th." (Italics ours.)

Both of these utterances are in evidence in the New York case, *Matter of Transit Commission* v. *Long Island Rail Road, supra*, p. 5.

(2)

The §13 order of 1925 was superseded and rendered *functus officio* by the §15a order of 1936, and was not revived by the §15a order of 1942.

Unlike other carriers, the North Western did not file with the Illinois Commerce Commission the "similar application" contemplated by the order of January 21, 1942. Instead, it challenged the jurisdiction of the State Commission, asserting that, under color of the 1925 §13 discrimination order, the Interstate Commerce Commission had retained jurisdiction which it reasserted by the §15a order of 1942. This thesis was an essential element of the *ratio decidendi* below (R. 55):

> "The said order of January 21, 1942 expressly modified the previous order of the Interstate Commerce Commission entered in 1925 (Exhibit A attached to the complaint herein), by which the Interstate Commerce Commission had taken jurisdiction over the passenger fares involved in this suit, which jurisdiction it had thereafter retained."

The words of the 1942 order which the Court below found, at the suggestion of the North Western, to have breathed new life into an order when it was six years dead—"modified • • • only to the extent necessary to permit"—are the very same words by which it had died six years before. The North Western insisted below with equal vehemence that these talismanic words when used in 1936 had not availed to *decrease* its intrastate commutation fares, but when used in 1942 by the same authority and under the same auspices, amounted to a peremptory mandate requiring that those very fares be *increased*.

This dialectical virtuosity evoked the following startling declaration from the Court (R. 51):

> "On February 28, 1936, in a proceeding known as Docket No. 26550, Passenger Fares and Surcharges (214 I. C. C. 174), the Interstate Commerce

> Commission, in a further general and nation-wide investigation of railroad passenger fares, entered an order which, by specific reference to its above-mentioned previous order in Docket No. 11703, retained its continuing jurisdiction over the Illinois intrastate commutation passenger fares here involved, although the effect thereof was not to require any modification of said fares."

An essential error of the decision below is here isolated. If continuation of Illinois intrastate jurisdiction resulted from "specific reference" in the order of February 28, 1936 to Docket No. 11703, then "specific reference" *ibidem* to Docket No. 11764 (Appendix G, *infra*, p. 65) must, in the view of the Court below, have availed to continue Texas intrastate jurisdiction as asserted in 1921 in aid of the revenue basis of *Ex parte* 74 (*Intrastate Rates within the State of Texas*, 60 I. C. C. 421). Yet, in 1942 we find the Interstate Commerce Commission conducting a new §13 discrimination investigation in Texas, ancillary to *Ex parte* 148 (*Increases in Texas Rates, Fares, and Charges*, ... I. C. C. ....., decided December 18, 1942), and under a new docket number—28846 (*supra*, p. 23). This 1942 investigation would have been needless if the holding of the Court below were valid.

The 1925 §13 order by which the Interstate Commerce Commission exercised intrastate jurisdiction *ad hoc*, in a single instance and for a transitory purpose, had been completely discharged and effectively rescinded by the §15a general revenue order of February 28, 1936.[13] As we shall show, the courts (except the Court below), the Interstate Commerce Commission and the carriers themselves agree on this point.

What the order of February 28, 1936 did was to substitute for the 3.6¢ basic *minimum* one-way fare which had

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[13] The complaint below refers to this order (R. 7), which was judicially noticed (R. 50, 51). It is annexed hereto *in extenso* as "Appendix G" *infra*, pp. 64-66.

been in effect since 1920, a fare of 2¢ as a *maximum*. The order of October 6, 1925 had fixed fares in consonance with that 3.6¢ basic minimum. The order of October 6, 1925 plainly referred—as did the report on which it was based—to *Ex parte* 74, the §15a general revenue investigation establishing the 3.6¢ minimum basic rate (R. 30).

When the order of February 28, 1936 revolutionized basic fare levels and policy, *the North Western did not change its commutation fares.* The *ratio* or *relationship* formerly existing between the 2¢ maximum for commutation travel and the 3.6¢ minimum for one-way travel was ended. *Thereafter*, the ratio or relation between the commutation fares and the one-way fares of the North Western was not the creation of the Interstate Commerce Commission. The only ratio or relationship between those two classes of fares ever created by the Interstate Commerce Commission had been that in effect between 1925 and 1936 only; and that ratio or relationship has not existed at any time since. It was replaced by a purely adventitious one, which imposed a heavier burden of revenue production, proportionately, upon intrastate commerce than the Interstate Commerce Commission had imposed in 1925. By destroying this relationship, previously established by it, the Commission marked its own exit from the field of intrastate jurisdiction over the commutation fares of North Western in Illinois.

This the Commission did consciously.[14] In 1938, upon the occasion of an experimental modification upward of the

[14] On June 6, 1936, a communication of the Interstate Commerce Commission, referring to the Long Island Rail Road, (which, like the North Western, had been affected by a §13 discrimination order vindicative of the rate-structure of *Ex Parte* 74) said:

"At the time the Commission's order in Docket No. 11623 affecting the intrastate fares in New York State was made the intrastate basic fare was 3 cents, and that order operated to increase that fare to the interstate maximum for coaches of 3.6 cents. The recent general [1936] order in the passenger case modified that order to the extent necessary to permit the reduced fares to become effective. It thus

maximum fares which it had fixed for interstate commerce in 1936, the Commission expressed (*Ex parte* 123, 227 I. C. C. 685, 690)

> "hope that the respective State authorities can see their way clear to authorize a maximum coach fare of 2.5 cents to become effective on intrastate traffic at the same time and for the same period as herein authorized on interstate traffic."

In 1936, it was the clear understanding of the Interstate Commerce Commission that the effect of the order of February 28 upon prior §13 orders was to abrogate them, not only by destroying the pre-existing Commission-fixed relation of intrastate to interstate fares, but also by operation

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becomes apparent that there is nothing in the order in No. 11623 as so modified which precludes the Long Island Railroad Company from charging 3 cents per mile in coaches and in Pullman cars as it did prior to the effective date of that order.

* * * the Long Island Railroad Company is not bound by any order from this commission to apply the prescribed interstate bases on its intrastate traffic. This being true, jurisdiction over the intrastate fares maintained by that road now reposes in the State and local authorities."

This communication is annexed hereto as "Appendix H", *infra*, pp. 67-68. It appeared in evidence in *Matter of Transit Commission v. Long Island Rail Road Company*, *supra*, p. 5.

After this communication a proceeding was commenced to compel the Long Island Rail Road (owned by the Pennsylvania Railroad) to reduce its intrastate fares pursuant to New York statutes (Public Service Law, §§31-32; Railroad Law, §57a) forbidding a railroad to charge intrastate fares in New York State higher than those charged by its parent outside of New York State. This litigation (*Matter of Transit Commission v. Long Island Rail Road Company*, 248 App. Div. 749, aff'd 272 N. Y. 27 [1936]) provided ample opportunity for the argument to be offered—as it is here offered on behalf of the North Western—that a §13 order made before February 28, 1936 remained in force thereafter as a muniment of jurisdiction in the Interstate Commerce Commission and an ouster of State authority. And yet, *all* the litigants, and the Courts agreed that the order of February 28, 1936 discharged the prior §13 order and restored full State jurisdiction. The Appellate Division of the New York Supreme Court (*loc. cit.*) declared:

"Under the authority exercised by the Interstate Commerce Commission the defendant [Long Island Rail Road] has enjoyed for sixteen years a rate in excess of that fixed by the laws of this State. Now the power to fix rates as to this defendant has again become vested in the State and the existing laws are effective."

of law (*infra*, Point II). After 1936, it could not be revived —certainly not *ex parte*.

The pertinent recitals of both the 1936 and the 1942 orders[15] show that any argument characterizing the 1936 order as a requirement that intrastate fares be changed must be materially weaker when applied to the 1942 order. In the 1936 order, the §13 order in Docket No. 11703 with which we are here concerned is explicitly identified, and it is "modified * * * to the extent only that may be necessary to permit" the changes then instituted in general revenue basis to be, or to become, effective. On the other hand, the 1942 order mentions §13 proceedings only by reference to the recital of them in the 1936 order, and confines this reference within a clause which can hardly be construed as more than a direction for filing, in the docket of those proceedings as well as in the dockets of "outstanding orders."

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[15] *Order of February 28, 1936:*

"IT IS FURTHER ORDERED, That all outstanding section 13 orders, including those in dockets Nos. 11623, 11703, * * * 11920, affecting intrastate passenger fares or charges, which are inconsistent with the conclusions reached in the aforesaid report or with the requirements of this order be, and they are hereby, modified, effective concurrently with the establishment of the interstate bases herein authorized or prescribed, to the extent only that may be necessary to permit the bases of fares and charges herein prescribed or authorized to become effective or to continue in effect, as the case may be; and that a copy of this order be filed in the docket in each such proceeding."

Order of January 21, 1942:

"IT IS FURTHER ORDERED, That all outstanding orders, as amended, of the Commission, authorizing or prescribing interstate and intrastate fares, or bases of fares, be, and they are hereby, modified, effective concurrently with the establishment of the increased fares herein approved, only to the extent necessary to permit the increase herein authorized to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of, said outstanding orders; and that a copy of this order shall be filed in the docket of each such proceeding, including those proceedings under section 13 of the Interstate Commerce Act enumerated in the order of February 28, 1936, in docket No. 26550, *Passenger Fares and Surcharges.*"

If the 1925 §13 discrimination order had been outstanding in 1942, it would have been embraced in the words of the 1942 order by which "all outstanding orders" are "modified". But it is specifically mentioned *in a second co-ordinate clause, after* "all outstanding orders" have been accounted for. The only apparent reason for this separate mention (by reference to the category of dockets of superseded orders to which it belongs) is an intention to include those dockets in the direction for filing—a consequence which would have ensued automatically had these superseded orders been "outstanding orders".

This separate mention after "all outstanding orders" have been accounted for cannot be deemed merely repetition. The quoted words of the 1942 order, following the word "proceeding" in the second co-ordinate clause, would be misconstrued if so treated. As this Court said in *Ex parte The Public National Bank of New York*, 278 U. S. 101, 104 (1928):

> "No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant." ' *Market Co.* v. *Hoffman*, 101 U. S. 112, 115 [1880]."

The applicability here of this fundamental canon of construction of documents, thus phrased in relation to statutes, is especially appropriate in view of the exercise by the Interstate Commerce Commission of legislative power as a delegate of the Congress.

The most that could be said for the North Western's construction of the order of January 21, 1942 (with which

the Interstate Commerce Commission itself disagrees) is that, contemplating language which the Interstate Commerce Commission had uttered as a negation of all intention to prohibit the proposed increase of fares, it mistakenly perceived therein an assertion of jurisdiction to require the increase.

POINT II.

In *Ex parte* 148, a general revenue proceeding under §15a, the Interstate Commerce Commission had no power to order change of intrastate fares.

Here we assume *arguendo* that the order of January 21, 1942, has been properly construed to require the North Western to change its intrastate commutation rates; and we show that this assumption entails the imputation to the Interstate Commerce Commission of an intention to exercise intrastate jurisdiction which it could not constitutionally exercise.

We shall refer to four principles, all judicially established, and all, in our opinion, violated by the decision below.

1. The adjustment of a general rate level to the demands of a fair return appropriately precedes the determination of rates for particular services.

This requires the determination of a general revenue policy under §15a of the Interstate Commerce Act before any question can arise of bringing intrastate fares into harmony with that policy by force of §13(4) of the Act.

According to the North Western's theory, as it prevailed below, the order of January 21, 1942, having the primary character of a quasi-legislative general revenue order applicable alike to all railroads in interstate commerce, possessed, at the same time, the added character of a command

to increase the particular intrastate rates here involved, in derogation of State authority. This contention does violence to the principle by which this Court was recently guided in a case which involved no question of contingent jurisdiction to regulate: the fixation of a general level of rates or charges, so as to produce a fair return to the regulated industry, rationally precedes the determination of the rates and charges for particular services. In *Federal Power Commission* v. *Natural Gas Pipe Line Co.*, 315 U. S. 575 (1942), this Court considered provisions of the Natural Gas Act of 1938, which had been modeled on Interstate Commerce Act, §§13 and 15, remarking (p. 584):

> "The establishment of a rate for a regulated industry often involves two steps of different character, one of which may appropriately precede the other. The first is the adjustment of the general revenue level to the demands of a fair return. The second is the adjustment of a rate schedule conforming to that level so as to eliminate discriminations and unfairness from its details. Such an orderly procedure for establishing the rates prescribed by the Act would seem to be an appropriate means of carrying out its provisions."

In the case cited, the regulating commission had equal jurisdiction of the regulated industry, whether for the determination of a rate level conducive to a fair return, or for the elimination of discrimination and unfairness in detail. This Court approved the postponement in time of the latter type of regulation to the former. But where, as here, the regulating commission can have only a contingent jurisdiction in the particular field of regulation in detail, because that is intrastate commerce; and where its jurisdiction depends upon a comparison between the facts of interstate commerce and the facts of intrastate commerce,

the principle which this Court approved above as one of rationality becomes an inflexible constitutional limitation.

Accordingly, repeated references in the report of *Ex parte* 148 to the impossibility of "ironing out of inequalities" or meeting "the needs of the railways individually" (248 I. C. C. 545, 607, 609) do more than reflect the inadequacies of the record. They indicate limitations of the scope of the proceeding of which the Interstate Commerce Commission was clearly conscious; and they render it almost unnecessary to refer to the clear declaration which this Court made in *Railroad Commission of Wisconsin* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 586 (1922), that

> "Section 15a confers no power on the Commission to deal with intrastate rates."

We have shown (*supra*, pp. 23-24) that the railroads of the country sought to gain State sanction for intrastate fare changes by applications which were generally contemporaneous with their petition to the Interstate Commerce Commission in *Ex parte* 148, inviting State action paralleling that which they anticipated from the Interstate Commerce Commission. Their object was to procure State consents as soon after the consent of the Interstate Commerce Commission as was practical. The virtual simultaneity of State and Federal relief thus sought by the railroads as a group, was not sought by the North Western. It made no application to the Illinois Commerce Commission; and that Commission is now disabled by the injunction of the Court below from determining that the North Western's new intrastate fares in Illinois are reasonable and permissible—which it might very well do.

2. Federal intrastate jurisdiction cannot exist except to protect and effectuate some established measure of regulation of interstate commerce.

The self-serving refusal of the North Western to submit its new fares to the scrutiny of Illinois authority should hardly be permitted to constitute an occasion for extending by implication the jurisdiction of the Interstate Commerce Commission into a field from which it is characteristically excluded. According to the North Western, the order of January 21, 1942 impliedly modified and re-established the §13 order of 1925 by which that carrier's intrastate fares had been put in due relation to an interstate fare structure which existed only between 1920 and 1936. It is essential to the North Western's theory to posit some survival of the order of 1925 after 1936. But this essential element cannot exist. An intrastate rate, established by a discrimination order which fixed it in relation to an interstate rate, does not vary with a subsequent variation of the interstate rate. Rather, it returns to the normal jurisdiction of the State authority, from which it had been removed for the exceptional purpose of correcting prejudice momentarily existing against interstate commerce.

In *Arkansas Railroad Commission* v. *Chicago, Rock Island and Pacific R. R. Co.*, 274 U. S. 597 (1927), a discrimination investigation resulted in a §13 order commanding the carrier to cease and desist from maintaining an Arkansas intrastate rate at a higher level than the interstate rate. This order was expressly made subject to the outcome of another pending investigation, having broader and more varied issues. The second investigation resulted in a change in the Arkansas interstate rate, but proposed no new intrastate rate; and the carrier sought to alter the Arkansas intrastate rate correspondingly, without procuring State sanction. Indicating the error of such proce-

dure, this Court held that, by altering the basis of comparison—the Arkansas interstate rate—the order in the second investigation wholly superseded the prior discrimination order, *viz.*, (p. 602):

> "There was no rescission in terms of the former order. But when the two orders are read together, as they must be, it is clear that the Commission construed its earlier order as requiring only that the Arkansas rates should not be lower than the interstate Memphis to Arkansas rates prescribed in that case, as long as they should be maintained."

Even where a discrimination order of the Interstate Commerce Commission relates the intrastate rate to the interstate rate "contemporaneously applicable", this Court has refused to countenance the argument that subsequent changes of interstate rate implied corresponding modifications of the §13 order, and consequent mandatory changes of the intrastate rate. *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 771 (1931).

In the case at bar, the §13 discrimination order of 1925 became discharged by operation of the general revenue order of February 28, 1936. In a parallel case, wherein the §13 discrimination order had been formally rescinded rather than discharged by operation of a subsequent order (*Board of Railroad Commissioners of North Dakota* v. *Great Northern Railway Co.*, 281 U. S. 412, 429 [1930]) this Court struck down an injunction restraining the State Commission from fixing intrastate rates pending the outcome of a current §13 discrimination investigation, saying (p. 430):

> "It is said that the interlocutory injunction, granted below, was in aid of the proceedings pending before the Interstate Commerce Commission. But the injunction necessarily has the effect of preventing the State from enforcing the rates it has

prescribed, which are lawful rates until the Interstate Commerce Commission finds that they cause an unjust discrimination against interstate commerce. A judicial restraint of the enforcement of intrastate rates, although limited to the pendency of proceedings before the Interstate Commerce Commission, is none the less essentially a restraint upon the power of the State to establish rates for its internal commerce, a power the exercise of which in prescribing rates otherwise valid is not subject to interference upon the sole ground of injury to interstate commerce, save as Congress has validly provided. Congress has so provided only in the event that, after full hearing in which the State authorities may participate, the Interstate Commerce Commission finds that unjust discrimination is created. Congress forbids the unjust discrimination through the fixing of intrastate rates but entrusts the appropriate enforcement of its prohibition primarily to its administrative agency.

It is urged that the restraining power of the Court is needed to prevent irreparable injury. But, in this class of cases, the questions whether there is injury, and what the measures shall be to prevent it, is committed for its solution preliminarily to the Interstate Commerce Commission."

3. Stale facts, rendered meaningless by subsequent change of circumstances, cannot support an administrative order.

The stale facts supporting a determination of prejudice and discrimination against interstate commerce by the North Western's intrastate commutation fares of 1925 cannot be availed of in 1942. This Court has held the Interstate Commerce Commission in error for maintaining in force, in the face of an application to reopen, an order issued in 1931 upon the basis of extensive evidence reflecting 1928 conditions—the error consisted in disregarding the judi-

cially-noticeable collapse of 1929. *Atchison, Topeka & Santa Fe Railway Co.* v. *U. S.*, 284 U. S. 248 (1932). In the case at bar, the error is greater, since the time span is greater and the economic vicissitudes have been more varied and extreme.

4. In controversy between State and Federal authority over the regulation of intrastate commerce, doubt is resolved in favor of the State.

In *Arkansas Railroad Commission* v. *Chicago, Rock Island & Pacific R. R. Co.*, 274 U. S. 597, 603 (1927), this Court announced a general principle which remains unquestioned:

> "The intention to interfere with the state function of regulating intrastate rates is not to be presumed. Where there is a serious doubt whether an order of the Interstate Commerce Commission extends to intrastate rates, the doubt should be resolved in favor of the state power. If, as the Railroad believed, the federal commission intended to include the intrastate Arkansas rates within its order, it should have taken action, through appropriate application, to remove the doubt by securing an expression by that commission of the intention so to do."

As we have shown, *supra* (p. 6) the order of January 21, 1942, has already been the subject of an "appropriate application" for "an expression by that Commission of the intention" to include "the intrastate [New York] rates within its order." In New York, as in Illinois, a single occasion had arisen, during the existence of the general revenue basis created by *Ex parte* 74 in 1920 for correction, by a §13 order, of State-sanctioned rates.

The Interstate Commmerce Commission refused to declare that the order of January 21, 1942 required the New York intrastate rates to be changed.

To the extent that the order of January 21, 1942 falls short of compliance with the statutory standards indicated by Interstate Commerce Act, §1(2a), §13(3) and (4), and §15a, as exemplified by the authorities given above, it transgresses the constitutional limitations imposed upon Congress in the regulation of interstate commerce. In *Board* v. *Great Northern Railway Co.* (*supra*, pp. 35-36), this Court reviewed the history of intrastate jurisdiction as asserted by the Interstate Commerce Commission in *The Minnesota Rate Cases* (230 U. S. 352 [1913]), and *The Shreveport Case* (234 U. S. 342 [1914]), finding that §13 (3) and (4) of the Interstate Commerce Act were a delegation to the Interstate Commerce Commission of full Congressional power, *viz.*, (281 U. S. 412, 426):

> "There can be no doubt that Congress thus intended to recognize and incorporate in legislative enactment the principle of the *Shreveport Case, supra.*"

In *The Shreveport Case*, 234 U. S. 342, 356 (1914), this Court had held that §3 of the Interstate Commerce Act as it then read was

> "certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn."

These were (*id.*, pp. 355, 356):

> " 'to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever,

or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.' "

This is still the gravamen of §3; in the scheme of the Act as it reads since 1920, however, discriminations due to State authority (*The Shreveport Case*) are separately denounced in §13(4). Whenever the Interstate Commerce Commission, purporting to act under §3, or §13(4), exceeds its statutory jurisdiction, it goes beyond the constitutional limitation of the power of Congress itself.

Accordingly, if the Court below correctly declared the meaning and intent of the order of January 21, 1942, the Interstate Commerce Commission thereby asserted intrastate jurisdiction which had not been granted to Congress. Since such construction of the order would contravene the Constitution, it should be avoided. *Cf. Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, 217 (1922).

POINT III.

If the order appealed from be not reversed, the cause should be remanded with directions to permit the meaning of the order of January 21, 1942 to be determined upon evidence.

If this Court should reject the arguments in this cause in support of reversal and dismissal of the complaint, settled policy would amply justify it in refusing to permit the novel and important questions which have been raised herein to be determined upon a record which consists of little more than an incomplete set of pleadings. This policy is exemplified by the decision in *City of Hammond* v.

Schappi Bus Line, Inc., 275 U. S. 164, 171-172 (1927), directing that an injunction which the Circuit Court of Appeals had deemed permanent be treated as interlocutory, and (p. 172)

> "remanding the cause to the District Court for proceedings on final hearing, with liberty to that court, among other things, to allow amendment of the pleadings."

This was because (p. 171):

> "Before any of the questions suggested, which are both novel and of far-reaching importance, are passed upon by this court, the facts essential to their decision should be definitely found by the lower courts upon adequate evidence."

In the *Schappi* case, an answer had been interposed, and proof by affidavit had been received. Here there is no answer, and the facts of the record are only those which may fairly be deemed admitted by demurrer. We have not attempted to show which of the allegations of the complaint are well pleaded, and which are conclusions of law or otherwise objectionable. Limitations of space forbid such an analysis. But, considering the New York litigation a demonstration that some of the essential propositions relied upon by the Court below are at least open to grave question, the policy of the *Schappi* case becomes a particularly strong reason why this Court should be disinclined to affirm the present unqualified decision, from which strained inferences casting doubt upon heretofore unquestioned principles might be drawn.

As we have shown, the order of the Interstate Commerce Commission of January 21, 1942 was not, clearly upon its face, such a mandate as the Court below held

it to be. Extrinsic evidence of its meaning would be admissible.[15]

We feel that we cannot leave the subject of the infirmities of the present record which have not been developed by our argument, or by that of the appellant, without mentioning still other propositions upon which the Court below erroneously relied, *viz.*, that, if not increased, the intrastate commutation rates of the North Western would be non-compensatory and unreasonable (R. 15, 54, 56), and discriminatory under §13 (R. 9, 51). Such declarations transcend two distinct limitations upon the jurisdiction of the courts. The first is a limitation in favor of the primary jurisdiction of the Illinois Commerce Commission over such a question as the reasonableness of intrastate rates, and of the primary jurisdiction of the Interstate Commerce Commission over the question of discrimination. *The Minnesota Rate Cases*, 230 U. S. 352, 419, 420 (1913); see especially *Board of Railroad Commissioners of North Dakota* v. *Great Northern Railway Co.*, 281 U. S. 412, 420, 423, 426-427 (1930):

> "We find no basis for the conclusion that it was the purpose of Congress to interdict a state rate, otherwise lawfully established for transportation exclusively intrastate, before appropriate action by the Interstate Commerce Commission."

---

[15] In its brief in the Court below (p. 9), the North Western referred to *New York* v. *United States*, 257 U. S. 591 (1922), as prohibiting extrinsic evidence where the validity of the order is collaterally attacked. But we are concerned, in this immediate context, with the meaning, not the validity, of an instrument unclear on its face; therefore any source, within or without the record in *Ex parte* 148, might yield relevant evidence. This was so in *Matter of Transit Commission* v. *Long Island Rail Road*, *supra*, p. 5; *cf. Porto Rico Sugar Co.* v. *Lorenzo*, 222 U. S. 481 (1912); 9 Wigmore, Evidence, (Rev. ed. 1940) §§2470, 2472.

The second limitation requir the federal equity courts, in the exercise of sound discretion, to defer to State authority, where, as here, that authority may yet preclude the litigation by satisfactorily resolving essential questions. *Railroad Commission of Texas* v. *Pullman Co.*, 312 U. S. 496, 500 (1941).

Conclusion.

The order and decree appealed from should be reversed and the complaint dismissed.

Dated, New York, January 5, 1943.

Respectfully submitted,

WILLIAM C. CHANLER,
Corporation Counsel,
Attorney for the City of New York,
Amicus Curiae.

HERMAN HOROWITZ,
MURRAY SENDLER,
of Counsel.

Appendix A.

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 6th day of April, A. D. 1942.

EX PARTE No. 148

INCREASED RAILWAY RATES, FARES, AND CHARGES, 1942

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of application of The Long Island Rail Road, The Staten Island Rapid Transit Railway Company and The New York Central Railroad Company, dated March 12, 1942, for clarification of the order of January 21, 1942, entered in the above-entitled proceeding, and of the replies to said application, and good cause appearing therefor:

It is ordered, That said application be, and it is hereby, denied.

By the Commission.

W. P. BARTEL,
Secretary.

(SEAL)

Appendix B.

Opinion on Motion to Reopen Case

107 New York Law Journal 1958, May 8, 1942.

By Mr. Justice Hofstadter.

Transit Comm'n and ano. v. *L. I. R. R. et al.*—

Upon the termination of the trial, this court found that it was impossible, on the record then before me to conclude that the order of the Interstate Commerce Commission of January 21, 1942, was intended by it to affect intrastate rates within the State of New York. To the contrary, the inferences naturally drawn from the language used by the Interstate Commerce Commission pointed in the direction that the matter of intrastate rates had been left to the state regulatory bodies. Mindful of a residuum of doubt, I then suggested that either side might apply to the Interstate Commerce Commission for a clarification of its order and that in the light of such clarification further proceedings might be had in this case to amend the decree then entered.

Acting on this suggestion, the petitioner [the railroads] initiated a proceeding before the Interstate Commerce Commission in the hope that a determination by the commission might resolve the indicated doubt in support of the petition. But that hope was not realized for the commission declined either to recognize the existence of any ambiguity in its order or to make further clarification if any such ambiguity existed. The only conclusion that can be drawn therefrom is that the commission did not wish in any way to interfere with or affect the decree of this court. There is nothing therefore in the proceedings before the commission or the denial of the application made to it which could possibly lead to a revision of my earlier determination.

The petitioner also points to certain proceedings which, since the entry of the decree in this case, have been had in connection with intrastate rates in the State of Montana.

Appendix B—(cont.).

While the exact nature of the proceedings there had does not appear from the documents now tendered by the petitioner, enough is produced to show clearly that the commission was there dealing not with a general clarification of its order of January 21, 1942, but with a special problem obtaining in the State of Montana. It is conceded that in the Montana case there exists no state regulatory body authorized to permit an increase of intrastate rates to conform with interstate rates, and that the absence of such state authority was made the basis of the application to the Interstate Commerce Commission by the Montana railroads. The Interstate Commerce Commission, on its part, responsive to the local situation there obtaining, made an explicit order granting the application there involved which, in the language of the petition there submitted, was for the purpose of expediting "the publication of the same rates intrastate in Montana as interstate." The proceedings in the Montana case, therefore likewise shed no light on the problem involved in the case before me.

The other matters proffered by the petitioner as a basis for reopening this case and reconsidering my earlier finding similarly are not persuasive. Without reiterating what I have previously said at some length, I need only add that nothing contained in the present petition or in the documents submitted therewith in any way affect the conclusions that I have heretofore reached. The importance of removing unjust burdens on interstate commerce by inadequate intrastate rates must naturally be a primary preoccupation of the Interstate Commerce Commission. Its unwillingness in the present instance to adopt the only course which would have certainly resulted in removing any such alleged burden can lead only to the conclusion that the commission itself is content to permit the matter of intrastate rates, in this instance at least, to be dealt with by the New York State regulatory bodies.

In dealing with the interpretation of administrative orders, of necessity courts must be governed by the precise

language employed in their promulgation. It would ill accord with the beneficent purposes of governmental regulation through administrative agencies, for the court to indulge in innuendoes and inferences designed to extend the scope of the commission's edicts beyond the natural implication of its words.

These proceedings will be opened only for the purpose of permitting the incorporation of the proffered exhibits into the record on behalf of the petitioner; otherwise this motion is in all other respects denied. Settle order on notice.

Appendix C.

BEFORE THE

INTERSTATE COMMERCE COMMISSION.

IN THE MATTER *of* INTRASTATE COMMUTATION FARES WITHIN THE STATE OF ILLINOIS.	Docket No. 11703.

Petition for Further Hearing.

To the Honorable the Interstate Commerce Commission:

Your petitioner, Chicago and North Western Railway Company, a party to the original petition in the above entitled proceeding, hereby respectfully petitions the Commission to reopen this proceeding in so far as it involves this petitioner's intrastate commutation passenger rates within the State of Illinois, and to hold a further hearing thereon. In support of this application your petitioner avers as follows:

I.

In an opinion bearing date of November 13, 1920, reported in 59 I. C. C. 350, the Interstate Commerce Commission rendered its opinion and entered its order in so much of this case as relates to passenger fares within the State of Illinois other than excursion, convention and other fares for special occasions, commutation and other multiple forms of tickets, extra fares on limited trains, and club car charges. It was stated in the opinion that fares

of this character not specifically passed upon would be reserved for further consideration. In accordance with this announcement, the Commission, by its order of December 2, 1920, assigned for hearing the matter of commutation fares within the State of Illinois. This phase of the case was heard at Chicago on December 18, 19 and 20, 1920, and at Washington on January 13, 1921. Briefs were filed, oral argument was had, and the case was submitted February 5, 1921, but has never been decided.

II.

That during all the time this case has been pending petitioner has been compelled to operate its intrastate commutation traffic on a basis of rates unduly preferential of intrastate traffic and of persons and localities within the State of Illinois, and unduly prejudicial to interstate traffic and to persons and localities outside said state, and unduly, unjustly and unreasonably to discriminate against interstate commerce.

III.

During all times mentioned herein your petitioner has published and still publishes interstate commutation passenger rates between points in Wisconsin and Illinois, under which rates there has been and is a substantial movement of traffic. The points between which such rates apply are as follows:

* * * * * * *

During all times mentioned herein petitioner has published and still publishes a number of intrastate commutation rates between Chicago, Illinois, and various Illinois stations too numerous to mention specifically herein but which are shown by the record. The majority of those rates apply to stations that are directly intermediate to the Wisconsin stations hereinbefore enumerated on movements to and from Chicago. A large volume of traffic has been and is moved under these rates, as hereinafter set forth.

Appendix C—(cont.).

IV.

Prior to the increase under *Ex Parte* 74, 58 I. C. C. 220, which became effective on interstate commutation passenger traffic August 26, 1920, there was a long established relationship between petitioner's interstate commutation rates, on the one hand, and its intrastate commutation rates in Illinois, on the other hand. The rates per mile were substantially the same interstate as for similar distances intrastate. Prior to August 26, 1920, the commutation rates, state and interstate, had always been changed together so as to preserve a nondiscriminatory adjustment as between intrastate and interstate commutation traffic. On the date last mentioned an increase of 20 per cent in the interstate commutation rates was put into effect as a result of *Ex Parte* 74, but there has been no corresponding increase in petitioner's intrastate commutation rates. The Illinois Commerce Commission, the body having charge of intrastate rates in Illinois, refused to allow petitioner to put into effect as to intrastate traffic the 20 per cent increase ordered in *Ex Parte* 74, notwithstanding petitioner's application therefor. As a result there exists a higher basis of interstate commutation rates than there is intrastate in Illinois, although the same trains carry both state and interstate passengers, who are accorded the same service. Undue preference is thereby given to intrastate passengers and localities within the State of Illinois, to the undue prejudice of interstate passengers and localities in the State of Wisconsin.

During the year 1924 petitioner's revenues from its Illinois intrastate commutation passenger traffic were $3,333,714.10. During the same year its revenues from its interstate commutation passenger traffic between the points named in Part III hereof were $237,979.06.

V.

Further discrimination against interstate commerce has been and is brought about by the fact that petitioner's inter-

state commutation rates have been and are being defeated by the purchase of intrastate commutation tickets between Chicago and Illinois points closest to the Wisconsin border combined with the use of local one way or roundtrip tickets from such border points to Wisconsin stations. The other interstate commutation fares can be and are being defeated by many interstate travelers where the combinations on such border points make less than the lawful through interstate commutation fares. This form of discrimination would be removed by the raising of the level of intrastate rates 20 per cent to that made effective on interstate rates August 26, 1920.

VI.

During each of the years 1920 to 1924, inclusive, petitioner has been compelled to operate its intrastate commutation passenger traffic in Illinois at a loss, due solely to the fact that the maximum rates it has been permitted to charge are unduly low. For the year 1924, which is fairly representative of any of the years 1920 to 1924, or of their average, the operating results of petitioner's Illinois intrastate commutation passenger traffic were as follows:

* * * * * * *

[Table omitted.]

The foregoing figures represent an operating loss. If consideration be given to the amount necessary to yield to petitioner the same percentage margin over operating cost, and taxes that all traffic yields, the revenue needs of petitioner are far greater than the amount of the operating deficit shown above. In 1924 the net operating income of your petitioner was 12.65 per cent of its total operating expenses, taxes and rentals. Its net return upon the value of its railway property held and used in the service of transportation was 3.31 per cent. If Illinois intrastate commutation traffic is to produce the same percentage of net return that all traffic of your petitioner averages, even though

that return is less than 5¾ per cent (the present rate of return fixed pursuant to the Transportation Act), it would require $1,883,103.43 of additional revenue, or 56.5 per cent increase in the present rates. The net operating income of the railroads of the United States as a whole was 19.75 per cent of their total operating expenses, taxes and rentals, and was less than 5¾ per cent return upon the aggregate value of their railway property held and used in the service of transportation. To produce the percentage of net return on petitioner's intrastate commutation passenger traffic that all traffic of the railroads of the United States as a whole produces, would require $2,230,214.50 of additional revenue, or 67 per cent increase in the present rates. The increase asked by petitioner in this proceeding is but 20 per cent and would supply only $666,742.82 on the basis of 1924 traffic, which would still be less than what petitioner should have to earn any return on its investment.

Petitioner alleges that its loss for 1925 on Illinois intrastate commutation passenger traffic, and for each succeeding year, will be as great as that in 1924 or greater, unless its rates are increased. In the absence of such an increase, this loss will fall upon other traffic, including interstate traffic, if petitioner is to earn a fair return upon its investment. Burdening interstate traffic with this loss constitutes an unlawful and unreasonable discrimination against interstate commerce.

VI. [*sic.*]

Petitioner is desirous of having this proceeding reopened for the taking of further evidence in order that it may show the facts hereinbefore set forth and prove that the undue prejudice, preference and discrimination upon which this proceeding was based still exist and have increased with each succeeding year since the hearing.

WHEREFORE, your petitioner prays that this proceeding in so far as it involves petitioner's intrastate com-

mutation passenger rates within the State of Illinois be reopened for the taking of further evidence. That after the taking of such evidence petitioner be allowed to file an additional brief herein and be heard in oral argument. That after such filing of briefs and oral argument the Commission enter an order declaring discriminatory, unjust and unlawful the present Illinois intrastate commutation passenger rates and any such rates less than 20 per cent more than the present rates, and prohibiting preferences and discriminations by requiring the establishment of intrastate commutation passenger rates in Illinois on the same level and basis as authorized by this Commission in *Ex Parte* 74, and prescribing rates, fares and charges or the maximum and minimum rates, fares and charges thereafter to be charged on Illinois intrastate commutation traffic. Petitioner prays for such other and further relief in the premises as to this Commission may seem right and proper.

Dated at Chicago, May 15, 1925.

R. N. Van Doren,
William T. Faricy,
Attorneys for Petitioner, Chicago and North Western Railway Company.

Fred W. Sargent,
Of Counsel.

Appendix D.

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 1st day of June, A.D., 1925.

IN THE MATTER *of* INTRASTATE RATES WITHIN THE STATE OF ILLINOIS.	No. 11703.

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of a petition filed therein, on May 15, 1925, by the Chicago & North Western Railway Company.

It is ordered, That the said proceeding be, and it is hereby, reopened for further hearing for the purpose of determining whether the commutation passenger fares of the said petitioner in effect between points on its line or lines in the State of Illinois are such as to cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce; and of determining what commutation passenger fares, if any, or what maximum or minimum, or what maximum and minimum, commutation passenger fares shall be prescribed to be charged and applied by said petitioner between points on its line or lines in said State in order to remove such advantage, preference, prejudice, or discrimination, if any, as may be found to exist.

Appendix D—(cont.).

It is further ordered, That the said proceeding be assigned for such further hearing at such times and places as the Commission shall hereafter designate.

And it is further ordered, That a copy of this order be served upon the said petitioner, upon the Governor of the said State, and upon the Illinois Commerce Commission, and that notice hereof be given the general public by posting a copy of this order in the office of the secretary of this commission at his office in Washington, D. C.

By the Commission:

GEORGE B. MCGINTY,
Secretary.

Appendix E.

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Petition of Railroads for Authority to Increase Their Rates, Fares, and Charges.

The railroads listed in Appendix I hereto, hereinafter referred to as petitioners, being substantially all the Class I railroads of the United States and some railroads of other classifications, respectfully petition the Commission for authority immediately to increase their freight rates and charges and passenger fares in the manner and to the extent hereinafter set forth, and in support thereof show:

I

Petitioners state that they recently incurred certain unavoidable and continuing increases in their operating costs, which are so substantial that, unless promptly offset by increases in revenues, they will seriously impair the financial resources of petitioners and greatly endanger their ability to continue to render adequate and efficient railway transportation service on which the safety of our country now more than ever before depends.

II

Petitioners state that on December 1, 1941, pursuant to the procedure provided for in the Railway Labor Act (Act of May 20, 1936, 44 Stat. 577, as amended), they entered into mediation agreements with representatives of the great majority of their employees providing for certain increases in wages to be made effective retroactively for the period September 1 to November 30, 1941, and somewhat greater increases to become effective December 1, 1941. On the

Appendix F—(cont.).

basis of employment during 1941, and taking into consideration only the employees covered by said mediation agreements, the increases which became effective on the latter date will result in a total increase in wages for all Class I railroads of about $311,711,000 per year.

III

Petitioners state that in addition to the increases in wages resulting directly from said mediation agreements they will undoubtedly find it necessary to make certain readjustments in the wages of employees not covered thereby, which will result in further substantial increases in their operating costs, no accurate estimate of which can now be made, but which will probably be in excess of $20,000,000 per year.

There have also ben advances during the past few months in the prices of many of the materials and supplies used by petitioners, and it is reasonably to be expected that such increased prices will carry over into, and at least in many instances be enhanced in, the future. While petitioners are not able at this time to give an estimate of the amount by which their operating expenses will be increased as the result of such advances in prices, they do know, and accordingly allege, that such increase will be substantial.

Petitioners are also confronted with increases in their operating costs of not less than $30,000,000 per year as the result of certain precautionary measures which they are now taking upon recommendations of the War Department to safeguard their properties and operations during the continuance of the present war.

Also, as the result of the exigencies of the war in which our country is now engaged, petitioners are being called upon frequently to perform and are performing, in connection with the transportation of troops and property for the United States, many special and unusual services which add to the cost of such transportation but for which no compensation is included in the normal transportation

charges named in petitioners' tariffs and ordinarily assessed by them on such movements. The extent of such extraordinary services will undoubtedly increase greatly with the contemplated expansion of our defense efforts. While it is impossible to furnish at this time even an approximation of the amount by which the operating expenses of petitioners will be increased as the result of this situation, it is certain that the increase will be very substantial.

IV

Petitioners state that, in view of the increases in their operating costs referred to above, the rates, fares, and charges under which they are now operating will not be adequate to yield them sufficient revenue over and above their operating costs to insure their ability to continue in the public interest the adequate and efficient service contemplated by Section 15a of the Act. For the twelve months ended September 30, 1941, the Class I railroads had a net railway operating income of $990,217,910.* It is obviously impossible to state exactly what the net railway operating income would have been had the rates of pay for labor during that period been on the increased basis which became effective December 1, and had the other increased operating costs referred to in Section III hereof been in effect during that period. Petitioners are convinced, however, and therefore allege, that had such conditions existed the aggregate net railway operating income of Class I railroads for such period would have exceeded their fixed charges for the same period by only a relatively small amount and many of such railroads would not have earned their fixed charges. The fixed charges of all Class I railroads for that period were $625,785,000.

* This figure does not include any readjustment to take account of the wage increases effective retroactively for the month of September, 1941.

Appendix E—(cont.).

V

Petitioners set forth below a statement which shows for all Class I railroads in the United States, the net railway operating income and the net income or deficit after fixed charges for each of the calendar years 1926 to 1940, inclusive, and for the first nine months of 1941.

RAILWAYS OF CLASS I IN THE UNITED STATES

Year	*Net Railway Operating Income*	*Net Income After Fixed Charges and Contingent Interest*
1926	$1,213,089,966	$809,054,202
1927	1,067,985,495	672,899,809
1928	1,172,864,100	786,823,584
1929	1,251,697,938	896,806,611
1930	868,878,773	523,907,472
1931	525,627,852	134,761,911
1932	326,298,008	def. 139,203,821
1933	474,295,613	def. 5,862,836
1934	462,652,379	def. 16,887,078
1935	499,819,118	7,539,127
1936	667,347,115	164,630,041
1937	590,203,925	98,057,740
1938	372,873,771	def. 123,471,074
1939	588,829,083	93,181,534
1940	682,133,478	188,851,151
1941 (9 months)	753,339,880*	359,710,614*

* This figure does not include any readjustment to take account of the wage increases effective retroactively for the month of September, 1941.

VI

Petitioners state that the increased operating costs with which they are now confronted are general in character and apply to all traffic handled by them, and that to the extent that is reasonable and practicable all traffic should be required to contribute to the payment thereof. In view of the critical nature of the situation with which they are now confronted, the only practical method by which they may obtain the necessary added revenues is by a general percentage increase in all their rates, fares and charges, with

certain limitations and modifications in connection with particular classes of traffic. They accordingly propose and herein pray authority from the Commission to make increases in their rates, fares and charges, including international rates, fares and charges and with corresponding increases in their joint rail and water and rail and truck rates, fares and charges as follows:

PASSENGER

A uniform increase of 10 per cent in all fares, including rates and charges for milk and cream and articles grouped therewith as published in passenger tariffs, except that no increase will be made in fares specially published for application to members of the military or naval forces of the United States traveling on furlough, and no increase will be made in the amounts published as extra fares applicable in connection with particular trains.

FREIGHT

A uniform increase of 10 per cent in all freight rates, except those on the following commodities, which shall be increased as indicated below:

* * * * * * *

VII

Petitioners state that in their judgment increases in their rates, fares and charges in the manner and in the amounts hereinabove proposed by them will not result in rates, fares, or charges that are unreasonable for the services covered thereby and will not result in a loss of traffic by petitioners to an extent that will deprive them of benefit therefrom in the way of a substantial net increase in revenue. Petitioners further allege that said increases are necessary to enable them to continue to provide the adequate and efficient transportation service demanded in the interest of the general welfare and national defense.

Appendix E—(cont.).

VIII

Petitioners estimate, on the basis of traffic (both interstate and intrastate) moved during the past year and now moving, and taking into consideration such readjustments in the resulting rates as commercial and traffic conditions may require, that the proposed increases will result in increased revenue for all Class I railroads of about $356,956,000 per year.

IX

Petitioners present in Appendix III hereto a summary of the principal facts and considerations upon which they rely in support of the foregoing allegations of this petition.

Petitioners accordingly pray that they be permitted to increase their rates, fares, and charges to the extent and in the manner hereinbefore described; that the Commission institute promptly such an investigation as, in view of the critical nature of the situation now confronting petitioners, is necessary to enable it speedily to determine and find that their rates, fares, and charges, increased in the manner and to the extent proposed by them herein, will be just and reasonable and not in excess of such maximum reasonable rates, fares, and charges as are necessary in the public interest to enable petitioners to continue to provide the adequate and efficient railway transportation service contemplated by law and required by the present national emergency; that the Commission grant petitioners special permission to make such increases effective by publication, on one day's notice, of simple forms of supplements to existing schedules, and that such supplements be permitted to become effective without suspension; that the Commission enter a general order modifying all its outstanding orders to the extent necessary to enable petitioners to make effective the increases herein proposed; and that where the

application of the increases herein proposed would result in creating new departures or changing existing departures from Section 4 of the Act the Commission by the entry of special orders authorize such departures.

Petitioners state that the increased operating costs hereinbefore referred to are being and will be incurred by them in the handling of intrastate, as well as interstate, traffic and that the estimate of increased revenues which petitioners will receive, as set forth in Paragraph VIII hereof, reflects the application of the proposed increases in rates, fares, and charges to intrastate traffic. It is respectfully suggested, therefore, that the cooperation of the State commissions be invited, as provided by law, in any investigation instituted and conducted by the Commission as herein prayed for.

Respectfully submitted,

R. V. Fletcher
J. Carter Fort
J. M. Souby
J. R. Bell
H. D. Boynton
E. H. Burgess
Elmer B. Collins
Frank [illegible]. Gwathmey
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W. A. Northcutt
Guernsey Orcutt
R. S. Outlaw
Elmer A. Smith
Carson L. Taylor
H. L. Walker
Charles R. Webber
Attorneys for Petitioners.

Dated at Washington, D. C.,
December 13, 1941.

Appendix E—(cont.).

The following Appendices to Appendix E are not reproduced:

Appendix I.

[This contains the names of 352 railroads which were the petitioners.]

Appendix II.

[Rules for disposition of fractions.]

Appendix III.

[This appendix consists of five exhibits summarizing operations, etc. of Class I rail carriers.]

Appendix F.

INTERSTATE COMMERCE COMMISSION
WASHINGTON

December 18, 1941.

EX PARTE NO. 148.

INCREASED RAILWAY RATES, FARES, AND CHARGES, 1942.

IN THE MATTER
of
THE PETITION OF RAILROADS TO INCREASE THEIR RATES, FARES, AND CHARGES.

The above-entitled proceeding is assigned for hearing at Hotel Morrison, Chicago, Illinois, before Commissioners Aitchison, Mahaffie, and Splawn, January 5, 1942, at 10:00 o'clock a. m.

Oral argument before the Commission at its offices in Washington will be held as soon after the conclusion of the oral testimony as possible, beginning at a date to be announced at the conclusion of the oral hearing. Briefs and written arguments will not be expected.

Attention is called to the appendix hereto, which contains special instructions and rules of procedure to be followed by parties who may appear herein.

By the Commission.

W. P. BARTEL,
Secretary.

[The "appendix hereto" consisted entirely of rules and recommended practice for the style, preparation and presentation of proof and argument; all drawn largely from the Commission's Rules XIII and XXI.]

Appendix G.

Order.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 28th day of February, A. D. 1936

No. 26550

Passenger Fares and Surcharges

IT APPEARING, That by order dated June 4, 1934, the Commission entered upon an investigation into the lawfulness of the passenger fares and Pullman surcharges maintained by all common carriers by railroad in the United States subject to its jurisdiction, for the purpose of determining what fares and charges, or what maximum or minimum or maximum and minimum fares and charges, should be prescribed to be charged in order to remove any unlawfulness in such fares and charges which might be found to exist; and that all railroads within the continental United States subject to the Commission's jurisdiction were made respondents in said proceedings;

IT FURTHER APPEARING, That a full investigation of the matters and things involved has been had, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

IT IS ORDERED, That the respondents herein, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before June 2, 1936, from publishing, demanding, or collecting (1) any Pullman surcharge as described in said report, and (2) any fares or charges for the transportation of passengers in standard equipment which exceed those on the bases hereinafter prescribed.

Appendix G—(cont.).

IT IS FURTHER ORDERED, That said respondents, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before June 2, 1936, and thereafter to maintain and apply to the interstate transportation of passengers in standard equipment, fares which shall not exceed 2 cents per passenger-mile, one way and round-trip, in coaches, and 3 cents per passenger-mile, one way and round-trip, in Pullman cars; provided (1) that reasonable extra fares, in addition to the regular passenger fares and Pullman charges for space, may be charged for passenger service which is definitely superior to that generally furnished, upon the condition that reasonably prompt and comfortable regular through service without extra fare be available to the public at hours which are substantially as convenient as those at which the extra-fare service is operated; (2) that the Pullman or coach fares, or both, at present maintained on the lines of the several respondents as outlined in the said report under the heading "Exceptions to the General Basis" may be continued in effect, but may not be exceeded without our approval; (3) that the practice, to the extent engaged in at present, of adding to the passenger fares special charges for transportation over certain bridges and ferries, or through long and exceptionally expensive tunnels, may be continued in connection with the maximum fare bases herein prescribed; and (4) that in publishing fares in compliance herewith a minimum charge of 10 cents for all classes of equipment may be observed, and sufficient may be added to the fares resulting under the bases herein prescribed so that all of them will end in 0 or 5.

IT IS FURTHER ORDERED, That all outstanding section 13 orders, including those in dockets nos. 11623, 11703, 11761, 11762, 11763, 11764, 11774, 11775, 11776, 11828, 11829, 11830, 11831, 11863, 11894, 12085, 12092, 12123, 12694, 13412, 14789, and 19920, affecting intrastate passenger

fares or charges, which are inconsistent with the conclusions reached in the aforesaid report or with the requirements of this order be, and they are hereby, modified, effective concurrently with the establishment of the interstate bases herein authorized or prescribed, to the extent only that may be necessary to permit the bases of fares and charges herein prescribed or authorized to become effective or to continue in effect, as the case may be; and that a copy of this order be filed in the docket in each such proceeding.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

George B. McGinty,
Secretary.

(seal)

Appendix H

INTERSTATE COMMERCE COMMISSION

Washington

June 6, 1936.

Offices of CLAUDE R. PORTER
Commissioner

Mr. Paul Windels,
Corporation Counsel,
Municipal Building,
New York, N. Y.

Dear Sir:

Your letter of May 29th with reference to the advertisement of the Long Island Railroad Company transmitted therewith, setting forth its intention to charge coach fares for intrastate traffic on a higher level than the maximum of 2 cents per mile prescribed by the Commission for interstate travel, has been referred to me for reply.

At the time the Commission's order in Docket No. 11623 affecting the intrastate fares in New York State was made the intrastate basic fare was 3 cents, and that order operated to increase that fare to the interstate maximum for coaches of 3.6 cents. The recent general order in the passenger case modified that order to the extent necessary to permit the reduced fares to become effective. It thus becomes apparent that there is nothing in the order in No. 11623 as so modified which precludes the Long Island Railroad Company from charging 3 cents per mile in coaches and in Pullman cars as it did prior to the effective date of that order.

While it is true that the passenger case was tried from beginning to end upon the theory that the maximum bases therein prescribed were to be applied intrastate as well as interstate, technically the Long Island Railroad Com-

Appendix H—(cont.).

pany is not bound by any order from this Commission to apply the prescribed interstate bases on its intrastate traffic. This being true, jurisdiction over the intrastate fares maintained by that road now reposes in the State and local authorities.

Yours very truly,

CLAUDE R. PORTER
Commissioner.